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SPECIAL LEGISLATIVE ISSUE



SUMMARY OF THE 2009 LEGISLATIVE SESSION

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The 2009 Legislative Session was very eventful as there were a number of bills filed that would have impacted community associations. However, the number of bills that passed this year was relatively small compared to previous years and none of the major community associations bills passed. The 2009 Legislative Session was mostly noteworthy for the bills that did not pass. This article will provide an overview of the legislation adopted in 2009 that affects community associations, and the legislation that was not adopted that would have impacted community associations.

HB 1718- RELATING TO THE STATE JUDICIAL SYSTEM

HB 1718 imposes increased filing fees for certain lawsuits, including foreclosure lawsuits. In some instances the filing fees are dramatically increased. When the "value of the claim" is less than \$50,000, which presumably would encompass most community association-driven foreclosure lawsuits, the filing fee in circuit court is raised \$100, from \$295 to \$395. When the "value of the claim" is more than \$50,000 but less than \$250,000, the filing fee is raised to \$900. When the "value of the claim" is \$250,000 or more, the filing fee in circuit court is raised to \$1,900. Additionally, probate filing fees (for formal administration cases) are increased \$115 to \$395. The filing fee for landlord-tenant disputes are reduced from \$265 to \$180. HB 1718 has been signed by Governor Crist and has an effective date of July 1, 2009, but the filing fee increases became effective June 1, 2009.

SB 2064- RELATING TO CONSTRUCTION DEFECTS

SB 2064 amends Section 558, Florida Statutes, which requires certain procedural steps be taken prior to initiating litigation concerning construction defects. The bill provides that the construction defect law will apply unless the parties agree that the law will not apply; that the applicable notice requirements are not required for a project that has not reached the stage of completion of the building or improvement; and that the contractor may not impose a construction lien for destructive testing or for repair damage caused by destructive testing, except if the owner contracts for the destructive testing or restoration. Further, the bill specifies that when a contractor forwards a notice under this section to any applicable contractors, suppliers, etc., the act of sending the notice may not be construed as an admission of any kind. The term "discoverable evidence" is further amended by this bill and requires any person served with notice under this statute to exchange, within 30 days, any design plans, specifications, as-built plans, expert reports, etc. Finally, unless the parties agree that this section does not apply, all contracts for improvement of real property entered into between an owner and a contractor must contain a notice which states as follows: "ANY CLAIMS FOR CONSTRUCTION DEFECTS ARE SUBJECT TO THE NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES."

SB 2064 was approved by Governor Crist on June 18, 2009 and the effective date is October 1, 2009.

SB 2080- RELATING TO WATER RESOURCES

SB 2080 amends Section 166.048, Florida Statutes. The prior version of this statute addressed "xeriscaping", which is a type

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of landscaping that conserves water and is drought tolerant. The prior law stated that a deed restriction or covenant adopted after October 1, 2001 may not prohibit or be enforced so as to prohibit any property owner from implementing xeriscape landscape on his or her land.

SB 2080 amends Section 166.048, Florida Statutes, and removes the provisions dealing with xeriscaping and replaces them with provisions dealing with "Florida-friendly landscaping." Florida-friendly landscaping is defined as "quality landscapes that conserve water, protect the environment, are adaptable to local conditions, and are drought tolerant." The principles of such landscaping include planting the right plant in the right place, efficient watering, appropriate fertilization, mulching, attraction of wildlife, responsible management of yard pests, recycling yard waste, reduction of storm water runoff, and waterfront protection.

The prior law regarding xeriscaping only applied to deed restrictions entered after October 1, 2001 (which is the date that the xeriscaping law became effective). However, SB 2080 is not limited to covenants recorded after the effective date of SB 2080. Rather, it will retroactively apply the Florida-friendly landscaping requirements to all covenants and restrictions, even those recorded prior to the effective date of SB 2080. As such, this law may be interpreted as an impairment of the rights of community associations, particularly homeowners associations, to require certain landscaping in their communities, pursuant to recorded covenants. It will be interesting to see how this law is ultimately interpreted by the courts, as there exists an argument that SB 2080 unconstitutionally impairs contract rights set forth in covenants recorded prior to the effective date of the law.

SB 2080 was approved by Governor Crist on June 15, 2009 and has an effective date of July 1, 2009.

SB 2330- RELATING TO CORPORATIONS

SB 2330 contains substantial changes to Section 617, Florida Statutes, which governs not-for-profit corporations. This statute does have applicability, in certain contexts, to community associations which are generally established as not-for-profit corporations. Most noteworthy, SB 2330 creates a new Section 617.1703, Florida Statutes, which states that in the event a conflict arises between Section 617, Florida Statutes, and the other statutes governing community associations (e.g. Sections 718, 719, 720, 721, 723), these other community association statutes will control over the provisions contained in the not-for-profit statute.

Several noteworthy changes to the not-for-profit statute include the following: places limits on the distribution of assets, allows documents (subject to certain restrictions) to be filed electronically with the department of state, allows for corrective documents to be filed with the department of state within thirty days (as opposed to the prior law which provided for ten days), creates a definition and new requirements for "mutual benefit corporations," allows for proxies to be rejected if there is a "reasonable basis" doubting the validity of the signature, amends the conflict of interest provisions, amends the requirements for mergers, amends the requirements for dissolutions.

The bill also amends the time-frames for action by written consent. Written consents must be obtained with 90 days after the date of the earliest dated consent (as opposed to 60

days in current law) and written notice must be given to non-consenting members 30 days after obtaining the authorization by written consent (as opposed to 10 days under current law).

The bill was approved by Governor Crist on June 18, 2009. The effective date of the new law is October 1, 2009, subject to limited exceptions specifically referenced in the statute.

HB 61- RELATING TO TEMPORARY ACCOMMODATIONS

HB 61 amends Section 125.0104 regarding the Tourist Development Tax, Section 125.0108 regarding the Tourist Impact Tax, Section 212.03 regarding the Transient Rentals Tax, and Section 212.0305 regarding the Convention Development Tax to specifically subject certain timeshare rentals to the taxes. The bill further expands the authority of sellers (as defined under Section 721, Florida Statutes, which governs timeshares) to offer debt cancellation products. The scope of the term "facility" defined in Section 721.05, Florida Statutes, is revised to mean a "permanent amenity." HB 61 also amends Section 721.07 to require the public offering statement to include information regarding the owners' obligation to pay assessments.

HB 61 was approved by the Governor on June 10, 2009. The effective date of the new law is July 1, 2009.

HB 821- RELATING TO COMMUNITY DEVELOPMENT DISTRICTS

HB 821 amends Section 190, Florida Statutes, the statute governing community development districts ("CDD" or "CDDs"). HB 821 revises the deed restriction enforcement rulemaking authority for CDD boards of directors by expanding their powers over real property, both within and outside the CDDs geographic boundaries, and authorizes covenant enforcement by the CDD in certain instances. Power over property outside the CDDs geographic boundaries can only be created via interlocal agreement or consent of the county or municipality. HB 821 further revises the procedures to amend CDD boundaries and merge CDDs. The bill creates a new definition of "compact, urban, mixed-use district" which is defined as a district located within a municipality and within a community redevelopment area created pursuant Section 163.356, Florida Statutes, that consists of a maximum of 75 acres, and has development entitlements of at least 400,000 square feet of retail development and 500 residential units.

HB 821 was approved by Governor Crist on June 10, 2009. The effective date of the new law is July 1, 2009.

HB 1495- RELATING TO PROPERTY INSURANCE

HB 1495, the insurance bill, will impact many community associations because it includes a provision allowing Citizens Property Insurance Corporation to increase premiums by 10% per year, until such time as its rates are actuarially sound. It also repeals the requirement to disclose a property's windstorm mitigation rating in any property sale over \$500,000 in the wind-borne debris region. The Legislature was considering a condominium mitigation loan program to assist condominiums in mitigating units against wind damage in a prior version of HB 1495. Unfortunately, this program did not pass because there was no money to fund the program.

HB 1495 was approved by the Governor on May 27, 2009 and became effective on the approval date (May 27, 2009).

HB 521- RELATING TO AD VALOREM ASSESSMENTS

HB 521 pertains to the challenge process for ad valorem tax assessments. It states that a property appraiser's assessment is presumed correct if the appraiser proves by a preponderance of the evidence that the assessment was arrived at by complying with Section 193.011, Florida Statutes. If a challenge is asserted, the burden of proof is on the party initiating the challenge to prove by a preponderance of the evidence that the assessment does not represent (1) the just value of the property, (2) the classified use value or fractional value of the property and (3) the generally accepted appraisal practices for comparable properties.

HB 521 was approved by Governor Crist on June 4, 2009. HB 521 became effective on June 4, 2009.

LEGISLATION THAT DID NOT PASS

SB 714- RELATING TO CONDOMINIUMS

SB 714 had many positive impacts for condominium associations including clarifying and fixing a number of the provisions from last year's condominium bills, and extending the date for fire sprinkler retrofitting from 2014 to 2025. However, Governor Crist vetoed the bill and expressed his concerns regarding the fire sprinkler retrofitting extension in his veto letter.

SB 714 included the following changes (which will now not go into effect because of the veto).

Mandatory HO-6 Insurance:

SB 714 would have reversed the 2008 change to the statute which required condominium associations to require unit owners to show proof of individual insurance and gave condominium associations the option of "force placing" coverage if the owner failed to provide proof of the required insurance.

Loss Assessment Coverage: SB 714 would have amended Section 627.714, Florida Statutes, to require that HO-6 policies, issued or renewed after July 1, 2009, must include "loss assessment coverage" of at least \$2,000, with a maximum deductible of \$250.

Replacement Cost Requirement: SB 714 would have required that the insurance appraisal the condominium association is required to obtain at least every 36 months be based on the "replacement cost" of the property, amending the 2008 law that required an appraisal for the "full insurable value."

Setting The Deductible: SB 714 would have eliminated the requirement for the notice of the board meeting where insurance deductibles are set to disclose the amount of the proposed deductible and potential assessments that may be adopted.

Association As Named Insured: SB 714 would have amended the condominium statute to no longer require that the unit owner's HO-6 insurance policy name the condominium association as a named insured and loss payee.



Board Elections: If there are fewer candidates who run for the board than there are open seats, the current law provide that the incumbents were automatically re-seated on the board. SB 714 would have changed this to say that incumbents who do not seek re-election are "eligible for reappointment"; it would no longer be automatic.

Co-Owners of Units on Board: Co-owners of units would have been eligible for simultaneous board service if they own more than one unit and are not co-occupants of a unit.

Fire Sprinkler Retrofit: SB 714 would have pushed back the fire sprinkler retrofitting requirement applicable to certain high-rise buildings from 2014 to 2025.

Director Delinquencies: The 2008 change to the statute provided that if a director was delinquent by more than 90 days in the payment of regular assessments, they were disqualified from further board service. SB 714 would have provided that a director is disqualified from continuing on the board if they are more than 90 days delinquent in the payment of a fine, fee, or any type of assessment, whether regular or special.

Director Certification: SB 714 would have eliminated the requirement for the condominium association's first notice of annual meeting to include a form to be signed by candidates which certifies that the candidates have read and will enforce the provisions of the condominium documents and Florida law, and would have replaced it with a requirement that directors who are elected will be required to certify in writing that they have read the condominium documents and will uphold them to the best of their ability. Alternatively, SB 714 would have permitted a newly

elected director to submit a certificate of completion of an educational program administered by the State.

Timeshare Condominium Associations: SB 714 would have presumably exempted timeshare condominium associations from the law passed in 2008 which prohibits multi-year terms, except where the bylaws provide for two-year staggered terms and where a ratification vote is taken. Additionally, SB 714 would have exempted timeshare condominium associations from the provisions in the current law restricting co-owners from simultaneously serving on the board.

Fire Prevention: SB 714 would have provided that a condominium that is one or two stories in height and which has an exterior means of egress corridor is exempt from installing manual fire alarm systems as required by Section 9.6 of the most recent edition of the Life Safety Code, which is incorporated in the Florida Fire Prevention Code.

Elevator Safety: SB 714 would have repealed Section 553.509(2) of the Florida Statutes. This law, adopted in 2006, requires buildings of at least 75 feet in height to have at least one public elevator capable of operating on an alternate power source for emergency purposes.

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The main impacts of the veto of SB 714 include:

- Condominium association boards will continue to be required to set the deductible at a meeting with fourteen days notice by mail and posting and the notice must state the proposed deductible and the available funds and the assessment authority relied upon by the board and estimate any potential assessment amount against each unit, if any.
- Unit owner insurance (i.e., "HO-6 insurance") remains mandatory and condominium associations will have to continue to request proof of insurance from the unit owners. "Force-placed" insurance is still an option per the statute, but associations are not required to force place insurance.
- Co-owners of a condominium unit cannot serve on the board, regardless of the number of units which they may own, and there will be no exemption for timeshare condominium associations.
- Candidates for the board of a condominium association will have to continue to certify that they have read and understand the Condominium Act and administrative rules.
- Condominium associations will be required to retrofit their buildings with firesprinklers, or obtain a vote of the owners to forego retrofitting, prior to December 31, 2014 (high-rise buildings may not opt-out of retrofitting the common areas).
- There will be no exemption to the manual fire alarm system requirements in the Life Safety Code for buildings that are one or two stories in height and have an exterior means of egress corridor.
- There will be no repeal of the requirement that certain high-rise buildings have a generator installed to power at least one elevator.

SB 880 - Relating To Community Associations: The Legislature was close to passing SB 880, which CALL had been working on and promoting. SB 880 would have (1) allowed condominium members' voting rights to be suspended if they are delinquent in paying assessments, (2) allowed condominium associations to suspend use rights to common facilities, (3) allowed associations to collect unpaid assessments from tenants, (4) allowed for the collection of costs imposed by a management company related to the recovery of unpaid assessments and (5) amended the Homeowners Association Act, Section 720, Florida Statutes, to provide a vehicle to allow a homeowners' association, if approved by the members, to acquire golf courses or other recreational facilities. SB 880 also addressed the purchase of units by "bulk buyers." The intent of this legislation was to stimulate the condominium market by encouraging purchasers to buy units in bulk. This would have especially helped distressed properties with large numbers of units that were never sold by the developer. Unfortunately, in the waning days of the Legislative Session, SB 880 became a vehicle for many amendments that would have been harmful to community associations including amendments prohibiting

associations from imposing transfer fees, and limiting board authority. Because of this, SB 880 ultimately did not pass.

SB 1012- Submerged Land Lease Fee Increases: SB 1012 dealt with submerged land leases (i.e. the leases coastal land owners enter into with the State to utilize non-tidal, navigable waters). The bill proposed to increase the amount charged under these submerged land leases. Waterfront community associations would have been significantly impacted by the increase. The ultimate defeat of this bill was a victory for waterfront community associations.

HB 1397—Relating to Community Associations: HB 1397 had many community association impacts including: (1) Limiting the ability of associations to make campaign contributions, charitable donations, and to hire lobbyists. This would have prohibited an association from even hiring someone to lobby local government with respect to a proposed development near the community; (2) Limiting the association's access to units by requiring that the association give unit owners written notice of not less than 24 hours of its intent to access the unit and such access must be by two persons, one of whom must be a board member or manager and the other person must be an "authorized representative of the association". The identity of the authorized representative must be provided to the owner prior to entering the unit; (3) Requiring the time and place of regular board meetings to be set by a majority vote of the unit owners. Once the time and place of the board meetings have been selected by the unit owners, it could not be changed except by a majority vote of the owners. Regular meetings of the Board held on weekdays could be held no earlier than 6 p.m.; (4) Requiring that if the bylaws can be amended by the board, an amendment to the bylaws must be approved at two consecutive meetings of the board held at least 1 week apart; (5) Limiting the ability of the board to enter into a line of credit or borrow funds for any purpose unless the specific use is set forth in the notice of board meeting with the same specificity required for special assessments or unless the borrowing is approved in advance by two-thirds of the entire voting interests.

Lender Liability for Assessments- Based on the dramatic results obtained from CALL's 2009 Florida Community Association Mortgage Foreclosure Survey Report—*State of Distress: The Mortgage Foreclosure Crisis within Florida's Condominium and Homeowner Association Population*, a strong push was made during the 2009 Legislative Session to adopt reforms in the area of collecting delinquent assessments from lenders. Proposals to require lenders to complete their foreclosures within a year, or to raise the statutory cap on liability for unpaid assessments, encountered fierce resistance from lenders and did not survive the committee hearing process despite the hard work of CALL and our members on this issue. In the end, the banking lobby was successful in their efforts to defeat this legislation. Notwithstanding, CALL will continue to make this issue a top priority going forward as needed change to the lender liability laws are long overdue.

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