

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



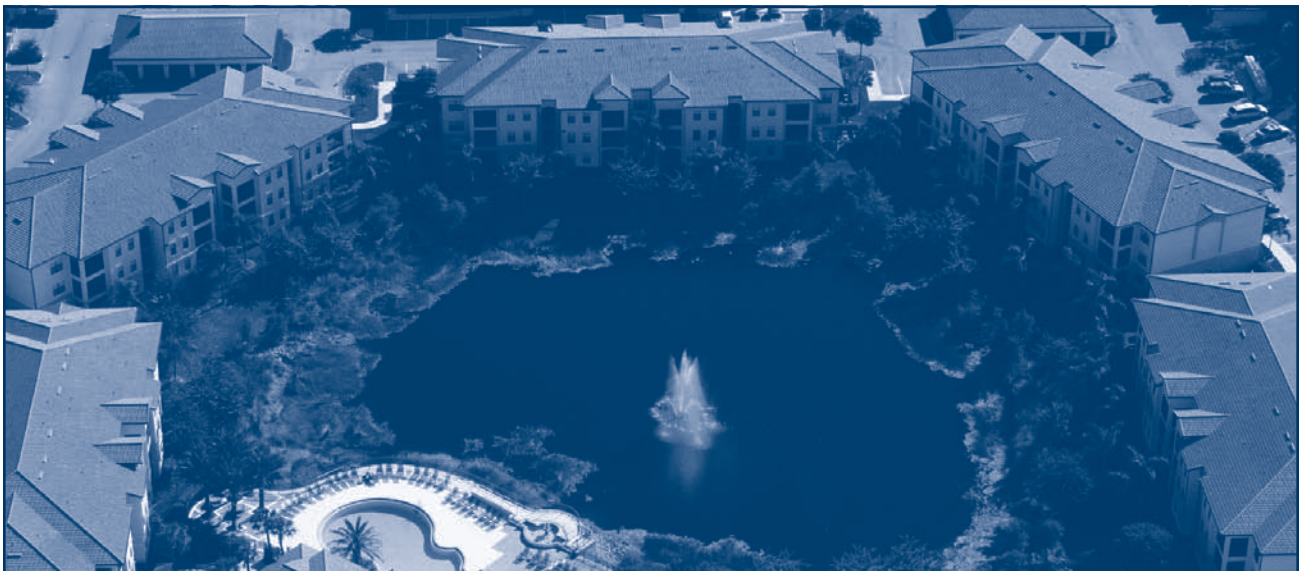
By Kenneth Direktor, Esq.
KDirektor@becker-poliakoff.com

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.

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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.

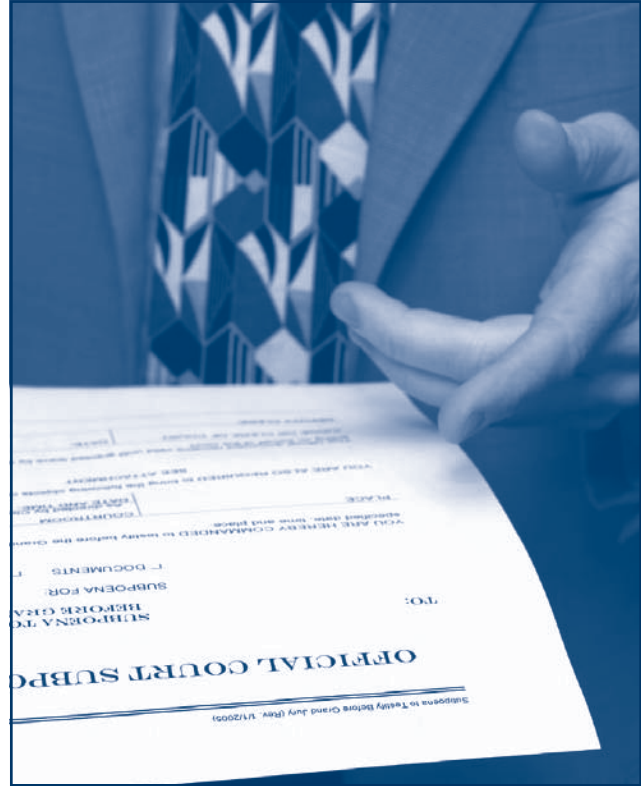
In other words, it’s unlawful to interfere with a process server trying to serve legal process.

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.
sdavis@becker-poliakoff.com

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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