COMMUNITY COUNSEL

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Our Top 10 List– The Last Two

We conclude our top-ten list of common questions and short answers. The final question coincides with the end of the legislative session and the Governor's decision on enrolled bills.

2. **I didn't know I was a member of an association. Why should I have to pay assessments or comply when the documents?** Because the covenants and restrictions, including the levying of assessments and the Association's duty to enforce the documents were matters of public record when you purchased your property. Unless the documents required advance notice to and approval of the Association before you purchased, the Association had no way of knowing you were becoming a member. However, as part of your purchase you obtained a title abstract and perhaps a title policy that referenced the governing documents. The Seller and any broker also had a duty to inform you about the association.

ASK US YOUR MOST COMMON QUESTIONS AND WE WILL ANSWER THEM.

1. **What's new this year?** Glad you asked. Despite an ambitious agenda, the Florida Legislature passed and the Governor signed pitifully few bills. Among the notable pass/fails for this year:

FAILS:

A. A fix to the documentary tax stamp problem that sparked an attempted money-making suit against 850 Florida associations. While the dismissal of the suit is on appeal and everyone supported the bill, this bill, like lost legislation, got capsized in the wake of the Presidential election fiasco and the Speaker's later tax and budget battles.

B. A fix to the Condominium Act that would have allowed owners to separately convey limited common elements without creating title problems.

C. An attempt to scuttle Condominium arbitration. However, in the battle most arbitrators quit and the budget failed to include the funding needed to carry out the statutory mandate. Look for possible constitutional problems to arise in this arena before next year.

PASSES:

A. Xeroscape. Covenants "entered" after October 1, 2001, may not prohibit an property owner from using plantings that favor water conservation and are "Florida-friendly." To avoid any problems we suggest that all contemplated changes to landscape covenants be in place by that date.

B. Registration of 55-and-over-housing. After October 1, 2001 all Florida housing for older persons must nor register with the State Commission of Human Relations and pay a fee annually. This appears to be nothing more than a money-raiser, but still must be complied with.

RECENT CASES

- BARKING DOG CAN STAY WHEN INJUNCTION IS OVER-BROAD.
- FLA SUPREME COURT CONFIRMS – FLORIDA IS A DEBTOR'S HAVEN.
- BANK COULD NOT PUT MORTGAGE PAYMENTS IN "SUSPENSE" ACCOUNT WITHOUT NOTICE AND THEN CLAIM DEFAULT FOR FAILURE TO PAY.

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

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RECENT CASE SUMMARIES

In **Knecht vs. Katz**, 26 Fla. L. Weekly D1392 (Fla. 5th DCA 6/1/2001), Katz brought a lawsuit which alleged that Knecht's Great Pyrenees dog barked constantly while the dog was permitted to remain outside of the home unattended. Katz requested that the court enjoin Knecht from maintaining the dog on the property ".... in such manner as to create noise sufficient to impair Katz peaceful and quite enjoyment of their property." Upon the conclusion of the trial, the trial court entered an injunction giving Knecht 30 days to remove the dog from the property. In reversing the trial court, the Fifth District Court of Appeal noted that Katz never complained about noise from the dog when the dog was within Knecht's home. The appellate court further noted that some barking is to be expected from dogs. As such, the appellate court held that before the trial court can order the removal of the dog, Knecht should be given the opportunity to cure the problem. The Fifth District Court of Appeal ruled that the dog should not be permitted to remain outdoors unattended so that continuous barking might disturb neighbors. The appellate court also held that if keeping the dog indoors or bringing the dog indoors when it starts barking will cure the problem, the injunction should go no further.

Havoco of America, Ltd., vs. Hill, 26 Fla. L. Weekly S416 (Fla. 6/21/2001) the U.S. Court of Appeals for the 11th Circuit certified the following question to the Florida Supreme Court: "Does Article X, Section 4 of the Florida Constitution exempt a Florida homestead, where the debtor acquired the homestead using non-exempt funds with the specific intent of hindering, delaying, or defrauding creditors. . . .?" Havoco obtained a $15 million judgment for damages against Hill in New Jersey on December 19, 1990. The judgment became final pursuant to law on January 2, 1991. However, on December 30, 1990 Hill purchased property in Destin, Florida for $650,000.00 in cash. The cash was not an exempt asset, and as such the cash could have been seized by Havoco to be applied to the judgment debt. Hill then filed for bankruptcy in Florida seeking to discharge the judgment and claiming the home as exempt under the Florida homestead exemption. The Florida Supreme Court answered the certified question in *the affirmative* and held that the home was exempt under Florida Law. The Court held that Article X, Section 4 of the Florida Constitution provides only three exceptions to the homestead protections. Because the facts of this case did not fall within any of the three constitutional exceptions, the homestead property could not be taken by Havoco for payment toward the judgment debt even though the fact Hill purchased the property specifically to intent to hinder, delay, and defraud Havoco.

In **Gulliver, et al., vs. Texas Commerce Bank, National Association**, 26 Fla. L. Weekly D1330 (Fla. 5th DCA 5/25/01) Bank took an assignment of the mortgage from a prior lending institution. At the same time, Bank sent Gulliver a letter notifying him that he was one month in arrears on the date of the assignment. Gulliver disputed the arrearage and continued to timely pay his mortgage. Without notifying Gulliver, Bank deposited all of the checks received into a "suspense" account and refused to apply the payments to the indebtedness. Several months later, Bank filed a foreclosure action, alleging that Gulliver made no payments on the mortgage from and after the date of the assignment. Prior to a hearing on the Bank's motion for summary judgment, the Bank submitted an affidavit swearing that no payments had been made since the assignment. Gulliver filed a counter-affidavit swearing that all payments had been paid and that Gulliver was not in default. Gulliver attached to this affidavit several canceled checks evidencing payment and receipt by the Bank. Five days prior to the hearing on the motion for summary judgment, the Bank filed a supplemental affidavit which clarified that although many payments had been received, the debt remained delinquent. The trial court granted summary judgment finding that Gulliver's defense of payment was not meritorious because the Bank had shown that some amount of a deficiency existed and because Gulliver had not filed copies of *all* of the canceled checks. In reversing the trial court, the Fifth District Court of Appeal held that Gulliver's defense of payment was meritorious and constituted a material issue of fact which precluded entry of summary judgment.

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