COMMUNITY COUNSEL

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RECENT CASES

- **Dogs and Cats may not be equal, but trial court was wrong to equate cats with fish and birds.**
- **Florida Supreme Court asked whether condo owners may be sued as a class by a contractor suing for breach of a balcony repair contract.**

Heads Up! 2003 Legislation Ends.

The 2003 session of the Florida Legislature is over, though at least one special session is starting. The adopted bills look far different from the proposals that went in. With no guarantee about what bills may be vetoed and not actually become law, here (in no particular order) is what did (and did not) occur in this very chaotic session.

1. CAM licensing survived, due primarily to pressure from watchdog groups like the Florida Legislative Alliance and others who mobilized when the call went out. However, the Governor has set up a fiscal train wreck for next year by refusing to support a bill that would have increased the fees CAMs pay to regulate themselves. Thus, a manufactured financial crisis looms, and it will take a coherent and well-organized lobbying effort by the CAM industry to save licensing, and with it any protection that association funds have from the con artists and shills of this world.

2. HOAs will be able to serve lien foreclosure actions on out-of state owners by certified mail.

3. Associations will be able to amend their bylaws to adopt a system for giving notice of association meetings to members who wish to receive them electronically.

4. Condo and Coop owners in buildings of 75 feet of less will be able to vote to opt-out of retrofitting for fire safety by a two-thirds vote of the members. Taller buildings will still be required to retrofit, but not before 2014.

5. Condo owners will be able to display flags of the one official flag of an armed services branch, not larger than 4 1/2 feet by 6 feet on five designated holidays per year.

6. All contracts for sale or resale of residential property will be required to contain a specific disclosure statement or the sale will be voidable by the buyer at any time prior to sale.

A chaotic legislative session ends with many issues in play and many battles fought.

7. Before asserting any residential construction or design defect claim a procedure for notice, testing and settlement by repair or payment will have to be followed. Failure to do so could bar the bringing of a claim.

8. Condo and Coop associations will not need to answer questionnaires posed by prospective lenders, but may charge $150.00 for providing good faith answers.

9. The same entities will be able to charge a reasonable fee for assessment estoppel letters.

10. HOAs will be able to extend their recorded covenants for additional terms of thirty years by a two-thirds vote of the Board.

11. HOAs will have a right to bring suit on matters of common interest to the community (though a rule of court will probably be necessary to make this constitutional).

12. The rights of HOA members that are "vested," requiring each owner's consent to alter, will be limited to adverse changes in voting rights and changes in the sharing of common expenses.

13. Members of the armed forces will be given greater rights to terminate leases and void purchase contracts for residential real property when they are relocated.

14. Additional disclosures will be required in construction lien cases.

15. A mandatory HOA study commission failed to pass.

16. Condo insurance requirement will be different and a "uniform" coverage provision will apply in January, 2004. Association will probably need to amend documents to conform and to mandate that owners provide proof of coverage.

WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1
W-M@WMLO.COM

RECENT CASE SUMMARIES

In **Loretta Prisco vs. Forest Villas Condominium Association, Inc.,** 28 Fla. L Weekly D 1065a, (Fla. 4th DCA, 4/30/2003) Association filed a complaint against Owner seeking to enjoin her from keeping a dog in violation of Association's pet restriction. Owner had signed a form acknowledging receipt of Association's rules and restrictions and agreeing to abide by them at the time she purchased her unit. In 1979 Association amended its declaration in an effort to ultimately remove all pets from within the association. Specifically, the declaration was amended to permit then existing *dogs* to remain in the condominium until death and/or removal and to prohibit the replacement of these animals. The declaration was further amended to state that ". . . . with the exception of these dogs, no pet of any kind whatsoever, except fish and/or birds, shall ever be permitted to be harbored in. . . . " the condominium. Owner defended on the ground of selective enforcement. Specifically, Owner alleged that since the amendment in 1979, Association had permitted numerous *cats* to be harbored in the condominium. Owner also alleged that there were two other dogs being harbored in the community and that Association was not attempting to remove these other dogs. The trial court granted Association's motion for partial summary judgment on the issue of selective enforcement. Ultimately, the case proceeded to trial without Owner being able to introduce evidence related to her defense of selective enforcement. At the conclusion of the trial, the trial court held that cats are not the same as dogs, and allowing a cat on the premises is not equal to disallowing a dog because dogs clearly bark, cats do not; dogs need to be walked outside of their home and cats do not – as they use litter boxes for the most part. The trial court equated cats with fish and birds because they do not require outside activity to defecate and urinate. The Fourth District Court of Appeal reversed the trial court. The appellate court noted that the restriction was clear and unambiguous in its prohibition of pets other than fish and birds. The fact that cats are different from dogs makes no difference. The appellate court held that what does matter is that neither a cat nor a dog is a "fish or a bird." Restrictive covenants must be narrowly construed, but should not be construed in a manner as would defeat the plain and obvious purpose and intent of the restriction. In this case, the obvious purpose of the restriction was to prohibit all types of pets except fish and birds. The appellate court held that the trial court's interpretation defeated the plain and obvious purpose of the restriction, reversed the decision and remanded the case for a new trial at which Owner would be allowed to present evidence on her defense of selective enforcement.

In **Four Jay's Construction, Inc., vs. The Marina at the Bluffs Condominium Association, Inc.**, 28 Fla. L. Weekly D951 (Fla. 4th DCA, 2/16/2003) Contractor sued Association as agent for, and class representative of, all owners of record of individual condominium parcels. The amended complaint was brought as a class action with Association named as the class representative of each unit owner. Contractor sought damages for breach of a construction contract. Pursuant to the contract, Contractor installed balcony additions to all buildings, benefiting all of the units in the condominium. The amended complaint alleged causes of action for breach of contract, quantum meruit, unjust enrichment, breach of oral contract, and promissory estoppel. The trial court dismissed the amended complaint and held that each of the individual unit owners could not be joined as a class. The Fourth District Court of Appeal reversed the trial court and held that it was error to dismiss the class action lawsuit. The appellate court recognized that the Florida Rules of Civil Procedure state that an association may sue and be sued as representative of condominium unit owners in an action to resolve a controversy of common interest to all unit owners. The appellate court noted that the issues involved in this case were of common interest to all unit owners and as such Association was the proper class representative of all unit owners. However, the Fourth District Court of Appeal, noting that Rule 1.221 of the Florida Rules of Civil Procedure and Chapter 718 does not explicitly state that unit owners may be joined as a class by a stranger/plaintiff by serving the Association, even though Association itself is a proper party defendant, certified the issue to the Florida Supreme Court as an issue of great public importance.

WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1
W-M@WMLO.COM