COMMUNITY COUNSEL

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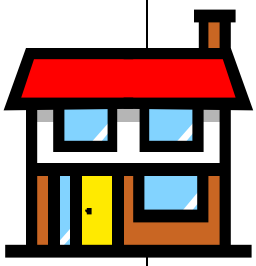
RECENT CASES

- **Assessments may not be withheld because a portion of the assessment is going to pay salaries to officers and directors to manage a community association.**
- **Association could be liable for a dog bite if it had reason to know of the presence of a dangerous dog on the common area and had an ability to control it.**

Limitations on Amendments

What limits are there on what an Association can accomplish by amending its documents? This remains both a hot issue legally and a hot-button issue socially, even after the Florida Supreme Court addressed the matter in its 2002 landmark *Woodside Village* decision. In that case the Court declined to restrict the ability of a condominium association to amend its documents based on the content of the amendment (a rental restriction) and an owner's right to use his unit (i.e. to rent it) as he wishes. The Legislature affirmed this holding in 2002 when it amended the Condominium Act to expressly allow changes to condominium documents by amendment in a range of substantive areas. In 2003 the Legislature spoke again, this time in the homeowner association context, where it scrapped a vague reference to the "vested rights" of owners in Chapter 720.306, Fla. Stat. Instead, it substituted a specific statement that changes to voting rights and/or the division of assessments are the sole issues requiring all owners' approval.



Now, the pendulum of social engineering may be swinging in reverse. Senate President Jim King has publicly announced his intention to aid a constituent in the coming session. The constituent is a condominium unit owner who objects to his association's recent anti-rental amendment, that effectively prevents the owner from earning rental income, without which he can not afford to keep his unit, which he had purchased as a future retirement home.

The controversy again clearly frames the conflict between individual and collective rights. In matters related to real property such disputes have surfaced many times in the past. Though it is difficult to generalize, it maybe safe to say that individual property rights usually prevail in the absence of strong public policy considerations. Hence, a community has no right to exclude minorities, and land owners may not use their property as they wish if the use might foul the air or water or endanger certain protected species of animals and plants.

Economic considerations alone have traditionally not been an acceptable rationale when resolving collective and individual rights disputes, though money is inevitably a background motivation. Witness the Telecommunications Act of 1996, which prevents satellite dishes from being regulated in any meaningful fashion. Though public access to communications is the policy consideration, the interests of the pay media can not be ignored.

Economics alone are not a basis for upholding individual rights over collective concerns.

A line of existing court decisions bans developer amendments that unreasonably change an existing development plan. We suspect that any legislative change in the law in this area will (and should) revolve around whether the community documents give notice that changes of this or any type are allowed or prohibited.

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RECENT CASE SUMMARIES

In **Barrwood Homeowners Association, Inc., vs. Gerecitano**, 10 Fla. L. Weekly Supp. 870a (15th Judicial Circuit (Appellate– Civil), Palm Beach County, September 4, 2003), Association brought suit against Owner to foreclose a lien for unpaid assessments. Pursuant to the governing documents, all owners are obligated to pay monthly assessments, due on the first day of each month, and are charged a late fee for non-payment after 10 days. At the December 1999 annual membership meeting, a $10.00 per month per unit increase in the monthly assessment was passed, in part, to pay salaries to officers of Association. Owner refused to pay the increased assessment, and accordingly, underpaid his monthly assessments by $10.00 per month per unit from January to August 2000. In August, Owner informed Association that he would withhold the entire assessment. Owner failed to pay any portion of the assessment due for September 2000. On September 12, 2000, Association filed suit against Owner to collect the unpaid assessments. Owner defended the action by contending that the $10.00 per month increase in the assessment was not enforceable, since it was for an improper purpose pursuant to Florida Statute 468.432 and further that Association had no right to charge a late fee for the September 2000 assessment. After suit was filed, but prior to final hearing, Owner paid the assessment for September 2000, less the $10.00 portion to which he had previously objected. At trial, Owner argued that the officers of Association were not licensed as community association managers by the Department of Business and Professional Regulation, and as such the additional $10.00 per unit assessment was illegal and improper. The trial court entered judgment in favor of Association for the $20.00 late fee for the September 2000 assessment. Additionally, the court ruled in favor of Owner on the additional $10.00 assessment, specifically holding that it was an improper assessment pursuant to Florida Statute 468.432. The court denied Association's motion for attorney's fees. On appeal, the circuit court (acting in its appellate capacity) reversed the trial court. Specifically, the circuit court noted that Florida Statutes 468.431 through 468.438 set forth a statutory scheme for regulation, licensure, examination, and continuing education for community association managers. The circuit court noted however, that conspicuously absent from the statutory scheme is any grant of private enforcement rights to individual unit owners or evidence of any legislative intent to allow individual members to refuse to pay a validly passed assessment based upon a violation of the statute. The clear statutory scheme is to provide discipline and enforcement through the Department of Business and Professional Regulation. The appellate court noted that there was no claim that the assessment was procedurally improper nor was there any argument that the assessment was not in compliance with the governing documents of Association. Simply stated, it is not a defense to a validly passed assessment that the payments were being made to persons not "licensed" as community association managers.

In **Sanzare vs. Coconut Key Homeowners Association, Inc., et al.**, 681 So. 2d 785 (Fla. 4th DCA 1996), Owner brought suit against Association for damages suffered by Owner when Owner was bitten by a dog on Association's common area. The dog was owned by two people who leased a residence in Association. Owner brought suit against Association alleging that Association was negligent. The trial court entered summary judgment in favor of Association on the basis that liability for the dog-bite incident could be imputed only to Owner of the dog or the landlord of the property where the dog was kept. Association argued that it owed no duty to the victim/owner who was bitten. The Fourth District Court of Appeal reversed the entry of summary judgment in favor of Association. The appellate court specifically held that a landowner may be liable for injuries resulting from an attack by a bad dog owned by a tenant if the landowner knows of the presence of the animal and its vicious propensity and has the ability to control the animal's presence on the property. The appellate court reversed the trial court due to the presence of unresolved issues of fact related to whether Association knew of the dog's presence in the community, whether Association knew of the dog's vicious propensity, and whether Association had the ability to control the animal's presence on the property.

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