COMMUNITY COUNSEL

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ALERT !!

Be alert and on the watch for proposed legislation attempting to carry out the written recommendations of the House Speaker's Committee on Condominiums. The recommendations go far beyond condos and threaten <u>every</u> volunteer officer and director in the state with loss of privacy and with personal financial liability.

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.

Voting Against Retrofitting

During the 2003 legislative session condo and coop communities received permission to limit their obligation to retrofit their communities for fire safety. The limited authority allows communities in residential buildings under 75 feet to vote to forego installation of either a fire sprinkler system or other engineered life safety system, while buildings over 75 feet in height may decide to forego all systems except a fire sprinkler system in the common areas of the building. In order to obtain that authority, however, a vote of at least 2/3 of all voting members is required, and a certificate memorializing the decision must be recorded in the public records no later than December 31, 2014.

As of January 28, 2004 The Division of Florida Land Sales, Condominiums and Mobile Homes adopted a new rule and form to carry out the legislative mandate it received as part of the same legislation. The Division is required to report to the State Fire Marshall on the number of communities choosing to opt out.

The rule and form Respond to the 2003 legislative mandate.

The Division's rule, found at 61B-23.002(3), F.A.C. also addresses some of the issues arising under the statutes [Sections 718.112 (2)(l) and 719.1055(5), Fla. Stat.] related to the vote that is required. The use of limited proxies by absent members, required in every other substantive vote taken by the members of an association, is expressly prohibited in this instance, but use of a written agreement, signed by the authorized voting member, is expressly permitted, notwithstanding any other provision to the contrary in the bylaws of the association. Use of written agreements is an excellent way to take membership votes, but in every other instance, the ability to use such a document must be permitted by the association bylaws or by a statute, and is governed by those bylaws.

For the retrofitting vote the written agreement used need only to be signed by the authorized voting members and identify the unit number. The written consent form may be used in conjunction with or in lieu of a membership meeting.

There is no limit to the number of times an association may attempt to take the vote between now and December 31, 2014, but by that deadline the vote must garner the required 2/3 vote membership approval, a certificate of approval must be properly recorded, **<u>and</u>** DBPR form CO 6000-8 must be filed with the Division. Failure to meet any of these condition will, presumably, invalidate an otherwise proper vote. The new form requires information about **<u>any</u>** vote on retrofitting, even if unsuccessful. Oddly, it also asks communities to report if they already have fire safety systems. This is odd because communities with such systems are unlikely to even consider taking such a vote unless they wish to abandon or remove those systems.

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 **Klak, et al., vs. Eagles Reserve Homeowners Association, Inc.**, 29 Fla. L. Weekly D231 (Fla. 2nd DCA 1/16/04), a large group of owners brought suit against Association seeking declaratory relief to determine who was responsible for reconstructing the defective walls of the dwelling units. Association is a community of non-condominium townhouses and villas in which each dwelling unit and the land on which it is located is owned in fee simple. Association undertook the repair and substantial reconstruction of certain dwelling units that were affected by serious construction defects. The Owners contended that the governing declaration of covenants and restrictions did not authorize Association to undertake the reconstruction project. In their complaint, Owners sought a judicial declaration concerning Association's duties and responsibilities with respect to the construction defects, relief for breach of fiduciary duty by Association, and for an accounting by Association. Owners were concerned that Association's assumption of responsibility for the repairs and reconstruction would adversely affect the ability of individual homeowners to pursue insurance claims for the damages to their units. Owners group posited a scenario in which individual homeowners would be unable to collect under their homeowner's insurance but would bear the economic burden of the repairs and reconstruction through maintenance assessments imposed by Association. The declaration provided that Association

"....shall have the right and obligation to maintain the exterior of the Dwelling Units, including the landscaping on the Lot, in good order and repair, including, but not limited to the following: painting exterior building surfaces, repairing, replacing and caring for roofs, gutters, down spouts; mowing, trimming and fertilizing trees...." As the Second District Court of Appeal noted, this case turns on the meaning of the phrase "the exterior of the Dwelling Units." The trial court determined that the term "exterior of the Dwelling Units" means everything from the interior coat of paint to the outside of the building. Based upon this interpretation, the trial court determined that Association had the responsibility to repair and reconstruct the damaged and defective exterior walls of the units. In reversing the trial court, the Second District Court of Appeal concluded that the trial court's interpretation of the text of the declaration was unreasonable and erroneous, because in interpreting the declaration the trial court neglected to give effect to the commonly understood meaning of the word "exterior." The term "exterior" is commonly defined to mean "the outer surface or part." Accordingly, the plain meaning of the phrase "the exterior of the Dwelling Units" is the outer surface of the dwelling units. That is a far different meaning than "everything from the interior coat of paint to the outside of the buildings." The trial court interpreted the phrase as though it made reference to the *exterior walls* of the dwelling units. However, the declaration contains no such reference or anything equivalent thereto. Furthermore, the consistent tenor of the entire maintenance provision of the declaration points to the conclusion that Association's responsibility for the maintenance of the walls of the units pertains only to the outer surfaces of those walls.

In **Huntington on the Green Condominium, etc., vs. Lemon Tree I-Condominium, etc.**, 29 Fla. L. Weekly D181 (Fla. 5th DCA January 9, 2004), both Huntington and Lemon Tree abut a new development and both opposed Developer's new construction. As part of negotiations with Developer, Huntington and Lemon Tree procured concessions from, including but not limited to Developer's agreement to construct a buffer wall for Huntington and contribution of $37,700.00 toward the construction of a buffer wall for Lemon Tree. Additionally, Developer contributed a lump sum payment of $155,000.00 to Huntington and Lemon Tree, for a total lump sum payment of $192,700.00. Lemon Tree was paid its $37,500 for construction of a buffer wall. After other distributions to attorneys and civic groups there remained a balance of approximately $75,000.00. Huntington and Lemon Tree agreed that the $75,000.00 balance would be divided equally by them unless it cost Lemon Tree more than $37,700 to construct its wall. Ultimately, Lemon Tree claimed the entire $75,000 on the premise that it would cost well in excess of $100,000 to construct its buffer wall. However, Lemon Tree never constructed the buffer wall. Huntington claimed entitlement to one-half of the $75,000 due to the fact that Lemon Tree never constructed the buffer wall. Lemon Tree responded that nothing in the agreement actually required it to build the wall. The trial court agreed, and awarded the entire remaining proceeds to Lemon Tree. The Fifth District Court of Appeal reversed the trial court and held that the trial court misinterpreted the distribution agreement. The appellate court noted that actual intent of the parties was to obtain an actual wall for Lemon Tree and to distribute the $75,000 depending on the extent to which, if at all, the actual cost of the wall exceeded $37,700. Since Lemon Tree did not actually build the buffer wall, it did not incur any costs related to the construction of the wall. That being so, Lemon Tree was not entitled to more than one-half of the $75,000 settlement proceeds.

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