COMMUNITY COUNSEL

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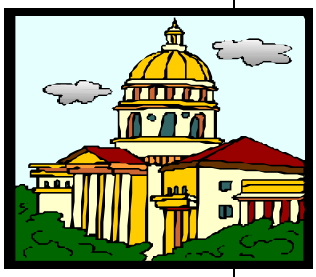
RECENT CASES

- **Holder of mortgage is not the same as holder of mortgagee's judgment as to condo assessments.**
- **West Palm Flag flyer gets a break from 4th DCA avoids foreclosure for attorney's fees.**
- **Award of attorney's fees reversed for failure to have sufficiently detailed findings of fact.**

PROPOSED LEGISLATION – SO FAR

On March 30, 2005 a number of organizations joined forces to present Florida's legislators with an accurate picture of the face of Florida's community association environment. Hundreds of persons, mostly Board members and rank and file owners came to the capital to show their support for responsible regulation and their opposition to a continuous stream of poor proposals that would create chaos in the their communities.



Despite the presence of many citizens in the Old State House, where various speakers expressed their views opposing bills such as HB 1229 (Robaina) and SB 2632 (Siplin), it was a small, staged "press conference" held in rotunda of the state capital that seemed to generate press interest. At that this event two legislators expressed their resolve to remake community associations of all kinds. The speakers were surrounded by a small group of T-shirted adolescents exhibiting the phrase "cleancondos.org." Although one person stated that they were there to advocate the unionization of community association workers, that person had no knowledge of any issues related to workers compensation insurance coverage for such workers. In short, this pretence of popular support and the media's unending thirst for controversy combined to brush over the larger call for reason and rationality in the law of community association. Here is a very short list of what these two horrible bills propose:

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1. SB 2632 would prevent associations from commencing lien foreclosures until an owner was delinquent by at least $2500 in assessments. Attorney's fees would not be subject to a lien. A similar proposal in California was vetoed last year by Governor Schwartzenegger. Although the bill fails to say who would make up the unpaid assessments or how necessary services could be afforded, the obvious answer is that those who pay their bills would have to make up the difference to prevent service interruptions. There would be nothing to prevent delinquent owners from perpetually maintaining a balance of $2499.

2. HR 1229 would impose broad state regulation over all types of community associations, even those, like HOAs that have never been regulated before in this fashion. It would make training of all Board members mandatory, and require a minimum level of reserve funding for all communities that could not be reduced or waived. It would install the new Condo Ombudsman as a czar over all associations and would require that all communities pay to have a full audit at least every other year.

The operation of the condo ombudsman's office has been a disaster, a situation that should not be compounded. Required training will tend to further decrease the pool of willing volunteer directors. HOAs are different from condos and should not be subject to the same micro-management that has afflicted Florida condominium communities.

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 **Bay Holdings, Inc., vs. 2000 Island Boulevard Condominium Association, Inc.**, 30 Fla. L. Weekly D547 (Fla. 3rd DCA 2/23/05), Bay Holdings appealed an adverse judgment holding that it does not come under the "safe harbor" provisions of §718.116(1), Fla. Stat. Bay Holdings was the assignee of a *final judgment* of foreclosure obtained by the first mortgage holder. § 718.116(1), Fla. Stat., provides a cap on liability of foreclosing mortgagees for unpaid condominium assessments that become due prior to the first mortgagee's acquisition of title pursuant to a foreclosure proceeding. The Third District Court of Appeal held that because the statute clearly and unambiguously afforded this safe harbor only to first mortgagees or "a subsequent holder of the *first mortgage*," the safe harbor provision did not apply to Bay Harbor because it took an assignment of the foreclosure *judgment*, not an assignment of the *first mortgage*.

In **Andres vs. Indian Creek Phase III-B Homeowners Association, Inc.**, 30 Fla. Law Weekly D799 (Fla. 4th DCA 3/23/05) Association brought suit to foreclose a judgment for attorneys' fees incurred in a prior covenant enforcement action. In the prior covenant enforcement action, Owner was found to have violated the governing documents by erecting a flag pole on his property. Association sued and successfully obtained an injunction requiring the removal of the flag and flag pole. Ultimately, Association was determined to be the prevailing party in the first litigation and a judgment for attorneys' fees was entered in favor of Association, against Owner. In the instant lawsuit, Association sought to foreclose its judgment for attorneys' fees claiming that the judgment for attorneys' fees constituted a lien against Owner's homestead property. The trial court entered a judgment of foreclosure in favor of Association and Owner appealed. On appeal, the Fourth District Court of Appeal reversed the judgment of the trial court. After an exhaustive review of the governing documents, the appellate court determined that the governing documents only permitted a lien against Owner's property for unpaid regular or special assessments. The judgment for attorneys' fees was clearly not a "regular" assessment under the terms of the governing documents. As such, in order for the appellate court to determine that the judgment for attorneys' fees constituted a pre-existing lien against Owner's homestead property, then the attorneys' fees must come under the "special assessment" requirement. After reviewing the governing documents and the definitions contained in the Florida Statutes, the appellate court determined that an "assessment" is a sum of money payable to Association by Owner of a parcel as authorized in the governing documents which, if not paid, can result in a lien. The appellate court noted that any ambiguity in the governing documents must be decided in favor of Owner. Because Association's governing documents did not classify the attorneys' fees incurred in the covenant enforcement action as "assessments" or "special assessments", then the attorneys' fees could not properly be the subject of a lien which could be foreclosed by Association. Therefore, the appellate court held that Association's governing documents did not provide for a continuing lien that preexisted the homestead exemption for the attorneys' fees in question.

In **Moyle vs. The Parkland Condominium Association, Inc.**, 30 Fla. L. Weekly D742 (Fla. 2nd DCA 3/16/05), Association brought suit against Owner to collect unpaid assessments, interest, attorneys' fees and costs. The trial court entered judgment in favor of Association and Owner appealed. On appeal, Owner argued that the trial court lacked jurisdiction and that the attorneys' fee award was improper. The Second District Court of appeal rejected, without comment, Owner's first contention. However, the appellate court reversed and remanded to the trial court the award of attorneys' fees. The appellate court reversed the trial court because the judgment failed to set forth specific findings as to the hourly rate for attorneys' fees, the number of hours reasonably expended, and the appropriateness of reduction or enhancement factors as required by Florida Law. The appellate court held that the order for attorneys' fees was fundamentally erroneous on its face as a result of the trial court's failure to set forth the required factors supporting an award of attorneys' fees.

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646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1