COMMUNITY COUNSEL

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RECENT CASES

- **The Division issues a Declaratory Statement wrongly interpreting the 2003 insurance amendments to the Condominium Act, making Association liable for deductibles and expenses over coverage limits even though the Declaration provides for a different result.**

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.

Government Regulation of Religious Activity

Recently, a rabbi who had been conducting religious services in an Orange County residential subdivision won a court ruling against Orange County Government allowing him to continue to conduct religious activities in the subdivision. Orange County pursued this matter because the rabbi's neighbors complained, not about the religious activities themselves, but about serious traffic and parking problems caused by the high number of participants in these activities. Unfortunately for Orange County , the case ultimately turned over treating religious activity differently than non-religious activity, rather than over the difference between residential and non-residential use of the property.

Like other jurisdictions, Orange County has a zoning code which divides the County into districts and imposes use restrictions on these districts. The rabbi's house is located in a residential zoning district which allows single-family homes, accessory buildings, home occupations, model homes and family dare care homes. The district permits other uses by "special exception," one of which is the right to operate a "religious organization." The rabbi did not apply for the special exception and was cited by County Code Enforcement. Ultimately, the Code Enforcement Board imposed a $50.00 per day fine, and the fine became a lien against the rabbi's property.

The rabbi sued Orange County in federal court under a federal statute, the Religious Land Use and Institutionalized Persons Act of 2000 (the "Act"), which prohibits local governments from treating religious organizations on less than equal terms with non-religious organizations. The rabbi also claimed Orange County's zoning restriction was unconstitutionally vague. The court sided with the rabbi, concluding that the County could not restrict the rabbi's activities without restricting similar gatherings of family and friends for non-religious purposes.

The Act expressly applies only to "governments" and therefore does **not** apply to associations. The vagueness issue applies to statutes, but an analogous concept is applicable to an Association's governing. Governing document provisions which are ambiguous are generally construed against the party attempting to enforce the documents.

This case probably has limited impact on enforcement of covenants.

Presumably, unambiguous documentary provisions restricting property to residential use will continue to be enforceable against property owners. Limiting property to residential use does not preclude owners from having a reasonable number of friends or family as guests, whether for religious or non-religious purposes, on a reasonable number of occasions. Where the number and frequency of visitors become excessive, however, it would be wise for associations to focus on non-residential activity as opposed to religious activity when enforcing the residential use provisions in the governing documents. Associations should strive to be neutral as to religion when bringing enforcement actions against activities that have become so intense and regular as to cause significant and ongoing traffic and parking problems for other owners and residents.

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RECENT CASE SUMMARIES

The Division of Florida Land Sales, Condominiums, and Mobile Homes recently issued a very important declaratory statement in the case of **In re: Petition for Declaratory Statement for Plaza East Association, Inc.,** DS 2005-055 (January 24, 2006). The question presented was whether Association, which is required under Sec. 718.111(11)(a), Fla. Stat. (2003) to insure certain portions of the condominium property, may pass on to individual unit owners the cost of repairing those items that would have otherwise been paid for by Association's insurance policy but for (1) the application of the insurance deductible, and (2) the need for amounts that are in excess of the insurance policy coverage limits, based upon provisions in the declaration that defines effected portions of the condominium property as part of the units and requires the cost of these repairs to be paid for by the unit owner.

Association was created by the filing of its declaration in approximately 1969. However, in 2003 Association amended many of the provisions of the declaration to conform to the newly adopted Sec. 718.111, Fla. Stat. Under the declaration as originally recorded, if the proceeds of assessments and of the insurance were not sufficient to defray the estimated costs of reconstruction and repair by Association, or if at any time during reconstruction and repair, or upon completion of reconstruction and repair, the funds for the payment of the costs of reconstruction and repair were insufficient, assessments must be made against the specific apartment owners who own the damaged apartments, and against all of the apartments owners, in the case of damage to the common elements, in sufficient amounts to provide funds for the payment of such costs. Association interpreted the declaration to require unit owners to maintain, repair and replace the unit's windows, doors and screened enclosures.

Sec. 718.111, Fla. Stat., was amended in 2003. As of May of 2003, Sec. 718.111 provided that associations are required to obtain insurance on (1) all portions of the condominium property located outside the units; (2) the condominium property located inside the units as such property was initially installed, or replacements thereof of like kind and quality, and in accordance with the original plans and specifications or, if the original plans and specifications are not available, as they existed at the time the unit was initially conveyed; and (3) all portions of the condominium property for which the declaration of condominium required coverage by the association. The statute further provides that notwithstanding anything to the contrary, the association's insurance coverage excludes all floor, wall, and ceiling coverings, electrical fixtures, appliances, air conditioner or heating equipment, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundaries of a unit and serve only one unit. The purpose of the statutory amendment was to clarify what portions of the insurance and insurable expenses for the condominium were to be paid by associations and what portions were to be paid by individual unit owners' hazard policies. The statutory amendment applied prospectively to all insurance policies issued on or after January 1, 2004, after which date all associations became responsible for adequately insuring for the replacement cost of the buildings, the components of the building structures, which includes the windows, doors, screens, and sliding glass doors that were initially installed when the building was built even where these are designated as inside the unit's boundaries. Under this statute, unit owner insurance is no longer an option, but a necessity. The items excluded from association coverage are intended to be covered under the unit owner's policy. Now, all repairs made after a casualty are governed by the statute, declaration insurance provisions as amended by the statute, and the insurance contract, in that order.

Association asks whether it or the individual unit owners are responsible for the cost of the repairs in cases where the damage caused by a casualty like a hurricane does not exceed the deductible under Association's insurance policy and no claim is made on the policy. The Division determined that the provisions of Sec. 718.111, Fla. Stat., applies retroactively to all condominiums, regardless of when the declaration was recorded. **The Division further determined that the statutory amendments do not affect nor alter any vested rights, as the insurance provisions in a declaration do not create any vested rights**. As such, the Division determined that Association may not shift the cost of its insurance to individual unit owners. The 2003 amendment to Sec. 718.111(11), Fla. Stat., permits associations to include a reasonable deductible in hazard insurance contracts, which deductible is a common expense. But it does not permit associations to shift the cost of paying the deductible to individual unit owners when no claim is made because the amount of insured damages is less than the deductible, nor the cost of repairing the Association's insurable damages up to the deductible amount. The cost of the insurance itself is a common expenses payable by all unit owners. Likewise, the cost of the deductible is a common expense payable by all unit owners.

(***Note: Many association practitioners disagree with this result.)***

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