COMMUNITY COUNSEL

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Recent Cases

- **Claims for breach of fiduciary duty have a four year statute of limitations.**
- **A factual issues exists for trial over whether an ARC approval was a re-approval of an earlier application or an approval of a new, different application.**

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.

Reduced Cost? Sales Tax Exemption on Energy.

Take a closer look at your energy utility bills. Although there is a tax on the sale of electric power and natural gas service by a utility company, your association may qualify for an exemption from this tax.

Section 212.08 (7) (j), Fla. Stat., and Rule 12A-1.053 of the F.A.C. explain the tax exemption on the sale of electric power or energy used in residential households, residential models, and the common areas of apartment houses, cooperatives, and condominiums. To qualify for this exemption: (1) the energy must be used exclusively for residential activities; (2) in a complex of many units, each home, unit of a condominium, or mobile home located in a mobile home park must be separately metered, or if metered together, the association must show that **all** units are using the energy solely for household purposes; and (3) the utility company must have a written affidavit on file with the utility company certifying that the account qualifies for the exemption.

You May be able to reduce utility costs, but you have to act.

The electric or natural gas service must be exclusively limited to residential activities. Residential activities include heating, cooking, lighting, refrigeration, or basic operation and maintenance of common areas, such as a pool, parking or recreation area, or recreation room. For an association to qualify for the tax exemption, no energy service billed to the account can be used for commercial or business purposes. Commercial activities might include, but are not limited to, rental operations that cater primarily to transient guests, i.e., hotels, motels, or room rentals, laundry rooms with coin-operated machines, vending machines, or the business office. So if the recreation room has an electric vending machine in it, it would void the entire account to qualify for the tax exemption and the account would be subject to the sales tax since the energy is not being used exclusively for residential purposes.

When an association has both residential and commercial activity, the residential and commercial activities must be serviced by separate accounts in order to qualify for the tax exemption. Sometimes, this is not possible. For example, if a condominium building is being metered by a single meter and the electricity measured by that meter is provided to 9 residential units and to the condominium business office, the entire account will lose its tax exempt status. However, if the building services 10 residential units for exclusively residential use and is sold pursuant to a residential assessment or tariff, the account will qualify for tax exemption.

So you think your association may qualify for tax exemption. Why, then, when you look at your energy bill, do you still see sales tax? This tax exemption is not automatic. In order for the utility company to grant you the exemption and remove the taxes from your bill, you must file a written affidavit with the utility company stating your qualification for the exemption. This affidavit should be filed for each qualifying account and signed by the account holder. Our office can assist you in preparing this type of document. Please be advised that should you decide to file an affidavit and it is later discovered that the energy account is servicing activities that are not exclusively residential, you, not the utility company, will be subject to the back sales and use taxes, interest, and penalties by the Florida Department of Revenue.

When the next energy and electric utility bills arrive, take another look at your bills, and also examine your energy use. If your account is being used for residential activities only, your association needs to let your utility company know so that you can take advantage of this tax exemption. The savings could be significant.

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RECENT CASE SUMMARIES

In **Berg vs. Bridle Path Homeowners Association, Inc., et al**, 31 Fla. L. Weekly D2097b (Fla. 4th DCA, 8/9/2006) Association filed suit against Owner seeking to foreclose upon liens recorded against Owner's property as a consequence of Owner's failure to pay assessments levied by Association. Following entry of summary judgment in favor of Association, Owner appealed. On a ***prior*** appeal, the Fourth District Court of appeal reversed entry of summary judgment, finding the lower court had improperly placed upon Owner the burden of demonstrating the assessments were levied in compliance with Association's governing documents and the relevant Florida Statutes. On remand to the lower court, Owner sought for the first time, to bring claims for breach of fiduciary duty, slander of title, and violation of Florida Statutes, against several of the directors of Association in their individual capacities. The directors moved for summary judgment, arguing Owner's claims against them were barred as a consequence of the immunity afforded these directors by section 617.0834, Florida Statutes, and the running of the statute of limitations. Section 617.0834, Florida Statutes, provides that directors are not personally liable for any statement, vote, decision, or failure to take action unless the breach of duty constitutes recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The trial court granted the motion for summary judgment and ***this*** appeal followed. On appeal, the Fourth District Court of Appeal reversed entry of summary judgment on the grounds of the immunity afforded by section 617.0834, Florida Statutes. Owner's counterclaim fairly alleged that the directors deliberately abdicated their responsibilities with respect to the annual budget, the levying of assessments, and the holding of board meetings and that such actions were taken in bad faith and with a malicious purpose and are adequate to avoid the immunity afforded by the statute. However, the appellate court affirmed in part the entry of summary judgment based upon the running of the statute of limitations. Claims for breach of fiduciary duty are subject to a four-year statute of limitations. Owner's complaint was based, in substantial part, on acts or omissions alleged to have occurred more than four years prior to the filing of the complaint. As such, the appellate court affirmed the entry of summary judgment as to all acts or omissions occurring more than for years prior to the filing of owner's complaint.

In **L'Etoile Homeowners Association, Inc., vs. Fresolone**, 31 Fla. L. Weekly D2405a (Fla. 4th DCA, 9/20/2006) Association brought an action against Owner for injunctive relief pursuant to the governing documents of Association. The basis of Association's lawsuit concerned the installation of a wall air-conditioning unit in a room addition which Association alleged was in violation of the declaration, and for which no approval for installation allegedly had been given. Prior to any construction and during the initial planning, Owner forwarded a request for an addition to their home and a hand-drawn sketch of the proposed addition to Association's architectural review committee. Apparently, Owner's sketch made no reference to the air-conditioning unit. Shortly thereafter, the committee sent Owner a signed request form with the required approval. Owners did not immediately begin construction. In September 2002, two years after receiving initial approval, Owners resubmitted their request to the committee for city permit purposes. Attached to this second request was an architect's drawing of the room addition that included a box with the designation "WALL A/C" where the present unit is located. On September 25, 2002, the only member of the committee sent the original approval with her updated signature to Owners. However, nearly eight months later, Association sent Owners a letter stating that the air-conditioning unit must be removed. Owners refused to comply. The trial court entered summary judgment in favor of Owners, finding that Owners were not in violation of the declaration. On appeal to the 4th District Court of Appeal, the court reversed entry of summary judgment, finding that material issues of fact remained for resolution by the trial court. Specifically, the appellate court found that there was a genuine issue of fact about whether the 2002 approval constituted re-approval of the 2000 request, which did not contain a wall air-conditioning unit, or approval of a new request, which did show the wall air-conditioning unit. Because the evidence permits different reasonably inferences as to this question, it is an issue of fact for the jury.

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