COMMUNITY COUNSEL

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WAIVER OF RETROFITTING FOR FIRE SAFETY

Oak Shadows Condominium Association is a 173 apartment conversion facility that was built in 1972 in Orange County. The facility was built without a fire sprinkler system or alarm system because neither were required to meet fire code requirements at that time. In August of 2007, the Orange County Fire Marshal's Office issued a final notice of violation against the Association for failing to have a monitored fire alarm system with automatic notification to the fire department and 110 volt smoke detectors located outside the sleep areas of the units. The citation was based on amendments to Florida's Fire Safety Code. The individual unit owners were not cited.

Due to the financial pressures some Associations were facing to meet current and changing fire code requirements, the Florida Legislature amended the Condominium Act by enacting Florida Statute 718.112(2)(l)(2007). The amendment allows an association to "opt-out" of retro-fitting an existing facility with a fire sprinkler system or "other engineered life safety system" if two-thirds of all voting interests in the affected condominium voted to forego installation of the systems. Upon approval, the Association is required to certify and record the vote with the county as well as with the Division of Land Sales, Condominiums and Mobile Homes. The Division reports the vote to the State Fire Marshal's Office. In addition, any current or future tenant at the facility as well as any subsequent purchaser of any unit must be notified in writing of the vote.

However, the Orange County Fire Marshal's Office took the position that a fire alarm system was not an "engineered life safety system" as provided in the statute, but only a possible component of such a system. The Fire Marshal also concluded that since the Association had authority over and responsibility for maintenance of the common elements, the Association was responsible for installation of the 110 volt smoke detectors outside sleeping areas in the units because the detectors had to be hardwired to the unit's wiring. This position was supported by at least one administrative law ruling.

In its appeal to the Fire and Life Safety Board of Appeal and Adjustments, the Association, through counsel, presented expert testimony from a licensed professional engineer for fire safety systems that a fire alarm system was an "engineered life safety system." Counsel also persuaded the Board that the unit owners were necessary parties for enforcement of the 110 smoke detectors because the Association was not authorized to make changes or modifications inside the units. Counsel also demonstrated that access to the common element (wiring) was not necessary for installation of approved smoke detectors inside the units.

FIRE ALARMS AND SMOKE DETECTORS ARE "ENGINEERED SYSTEMS"

The Board of Appeals ruled in favor of Oak Shadows Condominium Association, Inc. It concluded that the fire alarm system was an "engineered life safety system" in accordance with 718.112(2)(l)(2007). The Board also concluded that installation of the 110 smoke detectors could be accomplished without access to common elements. The Board also questioned whether the Fire Marshal could enforce this provision without citing the unit owners. Based on the Association's appeal, the Board saved the members of the Association an estimated $400,000 to $500,000 in costs to install the system.

Recent Cases

- **Where Association sought removal of a trial judge for alleged bias, the judge may only rule on the legal sufficiency of the request, not on its factual correctness. The judge was removed from the case.**
- **Be careful how you word a mediation settlement agreement, as the courts are without power to interpret it in a way that varies from its clear and plain meaning.**

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RECENT CASE SUMMARIES

In **Grandview Palace Condominium Association, Inc. vs. City of North Bay Village**, 33 Fla. L. Weekly D554c (Fla. 3rd DCA, February 20, 2008) Association was the developer-controlled association for the condominium. City cited the condominium with multiple code violations. Additionally, the condominium suffered subsequent hurricane damage. When Association failed to make the requisite repairs, City seized the building. Association sued City and its building inspector for injunctive relief and damages, alleging tortious interference with contractual obligations and an abuse of authority. Soon thereafter, the parties entered into a court-approved settlement agreement. Under this agreement, Association was to contract with a licensed general contractor or project manager to oversee the repairs. The judge in the case appointed a special master to oversee the repairs. Since problems persisted after the appointment of the special master, the judge further expanded the special master's duties to include hiring contractors and others to effectuate the repairs. Association moved to disqualify the judge on the basis that Association had a well-founded fear that it could not receive a fair trial. In support of the motion, Association asserted that the judge appointed the special master without proper notice of legal foundation and that the judge had shown bias in several hearings, including making statements that the judge "did not trust" the developer and that the judge threatened to jail anyone who opposed the special master. On appeal, the Third District Court of Appeal noted that when a motion is filed, the trial judge may only determine the motion's legal sufficiency. The judge may not pass on the truth of the facts alleged. In this case, Association's motion was legally sufficient it should have been granted and a successor judge appointed.

In **Bibi vs. Royal Hidden Cove at the Polo Club Homeowners Association, Inc.**, 33 Fla. L. Weekly D615a (Fla. 4th DCA, February 27, 2008) Owner sued Association because of the failure of Association to approve his plans to build a home on his lot. After mediating the dispute, the parties entered into a settlement agreement. However, the settlement agreement resulted in a further dispute which became the subject of an appeal to the Fourth District Court of Appeal. The problem arose in the first place because Owner had to have approval from two different associations, his homeowners' association, which was a party to the lawsuit, and a master association, which was not a party to the lawsuit. After becoming frustrated by his inability to start construction, either because of delay in starting construction after approval, or failure to receive timely approvals, Owner filed suit against Association, seeking declaratory relief as well as damages and other remedies. At mediation, Owner participated in the mediation only on the condition that the master association, not a party to the lawsuit, also participate in the mediation. Master association attended some, but not all of the mediation session. As a result of the mediation session, Owner and Association entered into a settlement agreement that allowed Owner to continue his lawsuit if his plans were not approved by August 19, 2005. As it turns out, Association approved the plans by that deadline; however, the master association did not approve the plans until several months later. The issue before the trial court centered on the meaning of one paragraph of the settlement agreement as applied to approval dates. The relevant provision of the settlement agreement stated "… *if both the defendant Association and the Master Association do not provide approvals as specified herein by August 19, 2005, either party may void this settlement agreement and proceed with the lawsuit.*" Owner completed construction of the home, but Owner took the position that, because both approvals were not obtained by the August 19, 2005, deadline, Owner was not required to dismiss the lawsuit for damages. The trial court found the settlement agreement unambiguous and that it permitted the Owner to continue with his lawsuit only if, as the agreement provided: "both the. . . Association and the Master Association failed to provide approval. . . ." In other words, if only one association failed to provide approval then the Owner lost his right to continue his lawsuit. On appeal, Owner argued that the intent of the entire agreement was to require approvals of both associations by a date certain, because obtaining the approval of only one would have been of no benefit to Owner. The appellate court agreed but noted that the court was without the power to change the terms of a contract to achieve what it might think is a more appropriate result. Because the condition of both associations failing to approve did not occur, the trial court did not err in interpreting the agreement in favor of Association.

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