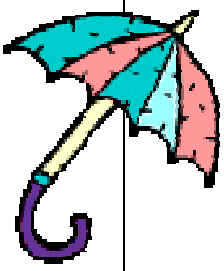
COMMUNITY COUNSEL

April, 2008 | A Publication of Wean & Malchow, P.A. | Volume 12, Issue 4

DOES YOUR ASSOCIATION NEED A "RAINY DAY" FUND?

Just as many families are struggling in this economy, it seems that many of our association clients also are straining to balance their budgets. Specifically, as the number of foreclosures (both mortgage foreclosures and lien foreclosures) rises, the amount of income being paid to associations is going down. As a result, associations are having to pay out more and more money to collect what is owed or otherwise having unpaid assessments wiped out in mortgage foreclosures. The problems of the current economy are, quite simply, a "double whammy" putting great financial strains on many associations.



One solution, while somewhat unpalatable, is also relatively simple: Those owners who are actually paying their assessments must bear a greater burden by paying additional assessments to make up for those owners who do not or cannot pay their fair share. The best way to accomplish this is through the funding of an unrestricted contingency line item in the budget. In addition, all associations (both condominium and homeowners' associations) are well advised to include in the budget a line item for anticipated "bad debt" or "uncollectible assessments." By adding these items to the budget, associations can ensure the existence of a fund that can be used to meet unexpected expenses and/or to cover losses of income caused by foreclosures. If the worst case scenario doesn't occur, the unrestricted contingency funds will not be spent, creating a budget surplus that can be applied to the budget for the next fiscal year.

As a "line item" in the operating budget (a contingency is not a reserve), the amount budgeted is included in calculating the 115% annual cap applicable to condominium budget increases pursuant to Section 718.112(2)(e)2a, Fla. Stat. It will also apply to any annual budget cap provided for in a homeowners' association's governing documents. Therefore, associations should strongly consider whether it is in the best interest of the association to automatically raise assessments to the limit each year in order to fund a "bad debt" line item.

Additionally, a "bad debt" line item is not, cannot be, and should not be funded from "reserve" funds. Because all reserve funding must have a specified purpose, an unrestricted contingency cannot be a proper condominium reserve. For homeowners' associations, reserve funding is now governed by Section 720.303(6), Fla. Stat., which also requires that covered HOA reserves to be used for specific purposes. Thus, while it is legal and proper to fund an unrestricted contingency line item in the operating budget, it is equally illegal and improper to fund an unrestricted contingency *reserve* fund.

Setting up an unrestricted contingency is a hedge against growing Delinquencies.

Finally, directors must remember their fiduciary duty to <u>all</u> members. Although many people are in severe economic difficulty, this can not dissuade the board from taking all reasonable actions to collect unpaid assessments. If you are going to ask the paying members to pay greater assessments, the least the board can do is take all reasonable steps to collect from those who have not paid. A board's failure or refusal to collect assessments from a struggling owner may seem noble, but in the long run it may make the situation worse for all owners, including those who do pay.

Recent Cases

- **Oral evidence is admissible in a suit for breach of contract to interpret ambiguous terms and to show the parties' understanding of the terms through their prior course of dealing.**
- **Amendments to HOA Declaration requiring existing members to become members of a golf club and to pay for maintenance and food was an unreasonable change in the scheme of development and hence invalid.**

WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM
WWW.WMLO.COM

RECENT CASE SUMMARIES

In **Emerald Pointe Property Owners' Association, Inc., vs. Commercial Construction Industries, Inc.**, 33 Fla. L. Weekly D1027a (Fla. 4th DCA April 16, 2008), Contractor brought suit against Association for breach of a roof maintenance contract. Contractor and Association had entered into a roof maintenance contract which provided that Contractor would regularly clean the tile roofs and would repair each tile roof leak with 72 hours of notification. After the execution of this roof repair contract by the parties, Contractor sent to Association a warranty which excluded leaks or damages caused by natural disasters, including but not limited to hurricanes. This warranty was signed only by the Contractor and was never signed by Association. In 1999, Association suffered roof damage as a result of Hurricane Irene. Association agreed to pay Contractor $6,250.00 for repairs made to the damaged roofs. In January 2004, upon the expiration of the original contract, the parties entered into a new roof maintenance contract the terms of which were nearly identical to the original contract. Once again, after the parties entered into the written contract Contractor sent the warranty notification denying liability for natural disasters, including hurricanes. Up until September of 2004, Contractor performed all work required under the contract and Association paid for all work in accordance with the terms of the contract. That ended when Hurricane Francis hit and Association suffered extensive roof damage resulting in multiple leaks that needed repair. Several days after the hurricane, Contractor sent a fax to Association indicating that any repairs completed due to damage from the hurricane were not covered under the contract and would require additional compensation. Contractor commenced making roof repairs without Association ever responding to or acknowledging the fax. Then Association notified Contractor it would not pay for the work, so Contractor stopped making repairs. When association stopped paying, Contractor filed suit for breach of contract. Association counter-sued Contractor for breach of contract. At trial, Contractor argued that the terms "leak" and "repaired" were ambiguous and that parol evidence should be admitted to clarify their meanings and to show the prior course of dealings between the parties. Association argued that the terms were clear and unambiguous and therefore no parol evidence should be allowed. Ultimately, the trial court held in favor of Contractor, ruled that the terms were not ambiguous, that Association was in breach of contract, and awarded damages to Contractor in the amount of $62,725.00. On appeal, the Fourth District Court of Appeal agreed with the trial court that the terms of the contract were ambiguous and that the admission of parol (oral) evidence was warranted. The appellate court noted that it would be unreasonable to believe that multiple leaking roofs damaged as a result of a hurricane could be repaired within three days, considering the patchwork design of blue tarps left behind in the wake of Hurricane Francis. However, the appellate court found that the award of damages to contractor were improperly calculated and remanded the case to the trial court to enter judgment in favor of Contractor in the amount of only $2,000.00.

In **Granuzzo vs. Willoughby Golf Club, Inc.,** Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida, Case Number 43-2004-CA-1006, Owner sued both Golf Club and Association alleging that certain amendments to the declaration were invalid as a matter of law. Specifically, the declaration was amended to merge Golf Club and Association; to require Owners to become members of Golf Club, to obligate Owners to share in the expenses of the maintenance and upkeep of Golf Club; and to obligate Owners to pay a yearly food and beverage minimum of $1200.00. Owner argued that the amendments changed the scheme of the development and that the amendments were unreasonable. The trial court found that the amendments received the necessary vote of sixty seven (67%) percent of the owners. However, relying upon the Florida Supreme Court's decision in *Woodside Village Condominium Association, Inc., vs. Jahren*, the trial court noted that the standard of review to be used to decide whether amendments are valid and enforceable is whether the power to amend the original declaration was exercised in a reasonable manner so as not to destroy the general scheme or plan of development. The trial court found that the instant amendments were not reasonable and had the effect of destroying the general scheme or plan of the community. As such, the trial court held that amendments were void *ab initio* and were unenforceable.

WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM
WWW.WMLO.COM